Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02–306 OF 2004 AND S-02–987 OF 2005
SURIYADI, HASAN LAH AND SULAIMAN DAUD JJCA
21 APRIL 2008

Civil Procedure — Jurisdiction — Forum conveniens — Whether Malaysian court proper forum for claim — Whether proven that some other tribunal had more competent jurisdiction — Interest of parties and justice

Civil Procedure — Stay of proceedings — Application for — Appeal against stay order — Whether judge erred in allowing application of stay — Whether Malaysian court proper forum for claim — Whether proven that some other tribunal had more competent jurisdiction — Interest of parties and justice

The plaintiff/appellant ('appellant') a duly licensed casino hotel had brought an action to recover a loan granted to the defendant/respondent ('respondent') amounting to US180,000. When the respondent visited the appellant's casino, she was granted certain credit facilities in the form of tokens to place her bets and to be entitled to these tokens, the respondent had to sign certain documents known as markers. Subsequently when the respondent lost in the gambling session, the appellant attempted to recover the full sum of US180,000 as a debt with the said markers as evidence. The appellant instituted the recovery action against the respondent, a Malaysian, in Kota Kinabalu, Sabah. However, the respondent proceeded with a stay action against the appellant on the grounds that the Malaysian court was not the proper forum for the claim. The respondent alleged that the claim could be tried with less expense and inconvenience in Las Vegas, Nevada than Kota Kinabalu. In her affidavit the respondent alleged, inter alia, that the recovery action by the appellant was the recovery of an alleged gaming debt pursuant to gaming agreements which were void and against public policy in Malaysia. In reply, the appellant contended that it was not seeking to enforce a gaming debt but the repayment of monies lent before any gaming took place. In fact, the appellant attempted to assert with proof that the credit instrument which represented a debt was valid and enforceable by legal process, as the appellant had a licence to operate a casino. The High Court granted the respondent a stay order. This was the appellant's appeal against that stay order. It was the

appellant's contention that the judge had erred in not applying the principles applicable for an application for a stay of proceedings on the grounds of forum non conveniens, and had determined the application on unrelated grounds. The respondent contended that the parties had agreed at arms length that only Nevada had the jurisdiction to resolve the matter. In support of its stance the respondent relied on the ouster clause in the markers she was given by the appellant.

Held, allowing the appeal with costs:

(1) The judge was in error when he made the issue of gambling as the central factor on route to granting the application when the special circumstance relied upon by the respondent for the order of stay of proceedings was that the Malaysian courts were not the proper forum. In fact the issue of forum non conveniens, which refers to the discretionary power of the court to decline jurisdiction when the convenience of parties and ends of justice would be better served if the action were brought and tried elsewhere, was not considered by the judge. By that failure he had failed to consider factors in the like of relative ease of access to sources of proof, availability of processes to ensure attendance of witnesses, willing or unwilling, costs involved in that exercise, and all practical problems that could make a trial easy, expeditious and inexpensive. Instead, the judge had erroneously targeted the pros and cons of gambling as his main ground of allowing the application of stay. As such the judge had also failed to consider whether the respondent was amenable to Nevada's jurisdiction (see paras 12–17).

(2) The respondent had failed to satisfy the court that some other forum was more suitable or appropriate. Moreover, the respondent being a resident of Malaysia had an entrenched statutory right under s 23(1) of the Courts of Judicature Act 1964 to have the case against her heard in Malaysia (see paras 18 & 20).

(3) If the respondent strongly believed that the action of the appellant was an abuse of the process of the court because of the ouster clause in the markers, then it need not have proceeded by way of a stay action. Instead the respondent could have proceeded under O 18 r 19 of the Rules of the High Court 1980 and alleged that the appellant's action disclosed no reasonable action and was an abuse of the process of the court. The fact that the respondent had not taken this route but instead unreasonably demanded that the case be heard in Nevada makes it appear that she was merely playing for time (see para 19).

(4) Moreover, there is also another added advantage of not having this case heard in Malaysia, in the form of the Reciprocal Enforcement of Judgments Act 1958 to which the USA is not a signatory. This means that a successful judgment in the States may not be easily enforced in Malaysia. As such, since the appellant was legally entitled to commence its action in Malaysia, it would be quite unjust to confine the appellant to remedies elsewhere (see paras 19–21).

[Bahasa Malaysia summary

Plaintif/perayu ('perayu') sebuah hotel kasino yang berlesen memulakan tindakan untuk mendapat balik pinjaman yang diberikan kepada defendan/responden ('responden') berjumlah US180,000. Semasa responden datang ke kasino perayu dia diberikan kemudahan kredit tertentu dalam bentuk token untuk membuat pertaruhan-pertaruhannya dan untuk berhak ke atas pertaruhan-pertaruhan tersebut, responden perlu menandatangani beberapa dokumen tertentu yang dikenali sebagai penanda. Kemudiannya apabila responden kalah dalam sesi perjudian, perayu cuba mendapat balik jumlah penuh US180,000 sebagai hutang dengan penanda tersebut sebagai bukti. Perayu telah memulakan tindakan untuk mendapat kembali terhadap responden, seorang warganegara Malaysia, di Kota Kinabalu, Sabah. Walau bagaimanapun, responden telah memulakan tindakan penggantungan terhadap perayu atas alasan bahawa mahkamah Malaysia bukan forum yang sesuai untuk tuntutan tersebut. Responden mendakwa bahawa tuntutan boleh dibicarakan dengan perbelanjaan yang kurang dan tidak menyusahkan di Las Vegas, Nevada dari di Kota Kinabalu. Dalam afidavitnya responden mendakwa, antara lain, bahawa tindakan untuk mendapat kembali oleh perayu adalah mendapat kembali hutang perjudian yang dikatakan menurut perjanjian-perjanjian perjudian yang tidak sah dan menentang polisi awam di Malaysia. Dalam menjawab, perayu menegaskan bahawa ia tidak memohon untuk menguatkuasakan hutang perjudian tetapi pembayaran balik wang yang dipinjamkan sebelum apa-apa perjudian berlaku. Bahkan, perayu telah mencuba untuk menegaskan dengan bukti bahawa alat kredit yang mewakili hutang itu adalah sah dan berkuat kuasa melalui proses sah, kerana perayu mempunyai lesen untuk mengendalikan kasino. Mahkamah Tinggi telah membenarkan responden satu perintah penggantungan. Ini adalah rayuan perayu terhadap perintah penggantungan tersebut. Adalah hujahan perayu bahawa hakim terkhilaf kerana tidak menggunakan prinsip-prinsip yang terpakai untuk prosiding penggantungan atas alasan forum non conveniens, dan telah menentukan permohonan tersebut atas alasan-alasan yang tidak berkaitan. Responden menegaskan bahawa pihak-pihak telah bersetuju bahawa hanya Nevada mempunyai bidang kuasa untuk menyelesaikan perkara tersebut. Dalam menyokong pendiriannya responden bersandarkan kepada klausa penyingkiran dalam petanda-petanda yang telah diberikan kepadanya oleh perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim terkhilaf apabila beliau menjadikan isu perjudian sebagai faktor utama untuk membenarkan permohonan apabila keadaan-keadaan istimewa yang digunakan oleh responden untuk perintah penggantungan prosiding adalah bahawa mahkamah-mahkamah Malaysia bukan forum yang sesuai. Bahkan isu forum non conveniens, yang merujuk kuasa budi bicara mahkamah untuk menolak bidang kuasa apabila kesesuaian pihak-pihak dan demi menegakkan keadilan akan lebih terjamin jika tindakan dimulakan dan dibicarakan di tempat lain, tidak dipertimbangkan oleh hakim. Dengan kegagalan itu beliau gagal untuk mengambilkira faktor-faktor yang sama secara relatif memudahkan untuk mendapat sumber-sumber bukti, proses-proses yang sedia ada bagi memastikan kehadiran saksi-saksi, secara rela atau tidak rela, kos yang terlibat dalam perlaksanaan tersebut, dan segala masalah praktikal yang boleh melancarkan perbicaraan, cepat dan tidak mahal. Sebaliknya, hakim terkhilaf dalam menumpukan kepada kebaikan dan keburukan berjudi sebagai alasan utamanya di dalam membenarkan permohonan penggantungan. Oleh itu hakim juga telah gagal mempertimbangkan sama ada responden tertakluk kepada bidang kuasa Nevada (lihat perenggan 12–17).

(2) Responden telah gagal untuk meyakinkan mahkamah bahawa terdapat forum lain yang lebih sesuai atau wajar. Tambahan pula, responden sebagai penduduk tetap Malaysia mempunyai hak statutori yang kukuh di bawah s 23(1) Akta Mahkamah Kehakiman 1964 agar kes terhadapnya didengar di Malaysia (lihat perenggan 18 & 20).

(3) Jika responden mempercayai sepenuhnya bahawa tindakan perayu merupakan penyalahgunaan proses mahkamah disebabkan klausa penyingkiran dalam petanda-petanda tersebut, maka ia tidak perlu diteruskan melalui tindakan penggantungan. Sebaliknya responden boleh meneruskan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan mendakwa bahawa tindakan perayu tidak menunjukkan apa-apa tindakan munasabah dan merupakan penyalahgunaan proses mahkamah. Hakikat bahawa responden tidak mengambil jalan ini tetapi sebaliknya menuntut secara tidak munasabah agar kes tersebut didengar di Nevada membuatkan ia kelihatan seperti dia ingin bermain dengan masa (lihat perenggan 19).

(4) Selanjutnya, terdapat juga satu lagi kelebihan tidak mendengar kes ini di Malaysia, dalam bentuk Akta Penguatkuasaan Salingan Hukuman 1958 yang mana Amerika Syarikat bukan penandatangan. Ini bermaksud penghakiman yang berjaya di Amerika mungkin tidak mudah dikuatkuasakan di Malaysia. Oleh itu, memandangkan perayu berhak dari segi undang-undang untuk memulakan tindakannya

di Malaysia, ia mungkin tidak adil untuk membatas perayu kepada remedi-remedi di tempat lain (lihat perenggan 19–21).]

Notes

For cases on application for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6504–6538.

For cases on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4420–4434.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd)

MacShannon v Rockware Glass Ltd [1978] AC 795 (refd)

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9 (refd)

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 (refd)

Zapata Off-Shore Co v The Bremen and Unterweser Reederei GMBH (The Chaparral) [1972] US CT 315 (refd)

Legislation referred to

Civil Law Act 1956 s 26

Courts of Judicature Act 1964 s 23(1)

Reciprocal of Enforcement of Judgments Act 1958

Rules of the High Court 1980 O 18 r 19(1)

Appeal from: Civil Suit Nos K-22–258 of 2002 and K-22–47 of 2004 (High Court, Kota Kinabalu)

Douglas Lind (Lind Willie Wong & Chin) for the appellant in Civil Appeal Nos S-02–306 of 2004 and S-02–987 of 2005.

Raymond Szetu (Baldev Singh with him) (Baldev Gan & Associates) for the respondent in Civil Appeal No S-02–306 of 2004.

Lim Hock Leng (Lim Guan Singh & Co) for the respondent in Civil Appeal No S-02–987 of 2005.

Suriyadi JCA (delivering judgment of the court):

[1] This appeal was heard with another appeal, ie S-02–987 of 2005 ('the second appeal') whereupon all parties had agreed that the decision of this appeal would bind that second appeal. At the end of this appeal we had unanimously allowed this appeals with costs whereupon the High Court's order in this case and the order in the second appeal were set aside. Deposits were ordered returned to the appellants.

[2] Since parties had agreed to be bound by the decision of this appeal I need only reproduce the facts of this appeal, and as agreed, equally applicable for the second appeal. The plaintiff ('the appellant') had brought an action to recover a loan granted to the defendant ('the respondent') amounting to US180,000. This sum owed came about in this manner.

[3] The respondent had affirmed that she had been contacted by one Niki Wong, a Singaporean, to gamble at the appellant's premises at Nevada, in the United States of America. Upon arrival at the appellant's casino she was granted certain facilities, under which arrangement the respondent was given tokens to place her bets. These tokens could not be used anywhere else. To be entitled to those tokens the respondent had to sign certain documents or colloquially known as markers.

[4] The respondent lost subsequently in the gambling session. The appellant thereafter attempted to recover the said full sum of US180,000 as a debt with the above markers as evidence. Instead of taking up the recovery action in Nevada the action was commenced at Kota Kinabalu, Sabah. The respondent thereafter took up a stay action on the ground that the Malaysian court was not the proper forum. When filing that application the respondent had stated that the claim would be tried with less expense and inconvenience in Las Vegas, with Kota Kinabalu not being the appropriate forum for trial of this matter.

[5] In her affidavit in reply, the respondent had knowingly agreed to the advancement for purposes of gambling and knew that she would be required to sign the documentation for the credit line. She merely claimed that she did not know the exact nature and terms of the gaming agreement. She further asserted that the recovery action by the appellant was recovery of an alleged gaming debt pursuant to gaming agreements which were void and against public policy in Malaysia.

[6] In reply, the appellant had contended that what was sought to be enforced was a claim for monies lent and not the enforcement of a gaming debt. The appellant in its affidavit in opposition, despite the assertion that the claim merely relates to recovery of a debt, saw it fit to make certain clarification when addressing the charges of the respondent. It asserted that gaming was legal in Nevada, America whilst the appellant was a duly licensed casino hotel and had the right to seek the enforcement of credit instruments which they represent. The appellant's assertion was that the credit instrument which represented a debt was valid and enforceable by legal process.

[7] To arrive at this credit instrument stage the scenario will be as follows: The patron who wishes to make bets but wishes credit will have to submit his

credit application first. Assuming that approval is granted the casino will provide chips or money usually upon the patron signing a counter-cheque or marker. The latter, which is computer generated, is used in place of a personal cheque. Each marker bears the following printed words:

> For value received, I represent that the above amount is on deposit in said bank subject to this check and is hereby assigned payee, and/ guarantee payment with exchange. I authorize completion, if necessary, by the payee, of any missing amount, my bank account number, and the name, address and branch of my bank. I waive any right to stop payment and waive presentment, protest, and notice of dishonor. I further agree to pay all costs of collection including attorney's fees and that in any matter relating to this instrument, Nevada law will govern and jurisdiction is proper solely in Nevada.

[8] The appellant had contended that it was not seeking to enforce a gaming debt but the repayment of monies lent before any gaming took place.

[9] The respondent was able to succeed before the High Court judge and a stay order was granted. Being dissatisfied the appellant had filed this appeal. The appellant had complained that the learned judge had erred in not applying the principles applicable for an application for a stay of proceedings on the grounds of forum non conveniens, and had determined the application on unrelated grounds.

[10] Having scrutinised the learned judge's grounds of judgment, it was quite obvious that much of his attention, amongst others, had been grabbed by matters relating to gambling. He had written that s 26 of the Civil Law Act 1956 was applicable, as decided in the case of *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 in that '… any transaction taking place outside jurisdiction can only be enforced in the local courts if they are not contrary to the local laws and regulations'. He had made a finding of fact that the loan granted was a gaming transaction, and as gaming was illegal in Malaysia the appellant thus was prevented from recovering the impugned sum. As parties had agreed to the exclusive jurisdiction of Nevada let alone trying the action in Malaysia would offend the sensitivities of almost all communities of Malaysia, as the majority of the citizenry were against gambling as reflected in the Malaysian laws, the stay was granted.

[11] In open court we did mention our broad reasons for allowing the appeal to be as follows:

(i) parties had agreed that the High Court of Sabah and Sarawak is not ousted to hear this case notwithstanding the markers' clauses on the factor of jurisdiction;

(ii) the issue of forum non conveniens was not considered by the learned judge as conceded by the respondent;

(iii) with the choice having been made by the appellant to submit itself to the jurisdiction of the Sabah and Sarawak High Court, and with the respondent residing in Sabah, there was no good reason for the respondent to complain;

(iv) the matter rests primarily on documents only and may not involve a large number of witnesses. Even if so that would be a problem for the appellant; and

(v) in the interest of justice the forum of convenience would be the High Court of Sabah and Sarawak.

[12] We were of the view that the learned judge was in error when he made the issue of gambling as the central factor on route to granting the application (He had made a finding of facts and assumptions regarding the factor of gambling at this stage, merely based on the bare assertions of the respondent. In fact the reverse could also be true as it is universally known that controlled gambling does exist in Malaysia, be it at the Genting Highlands or at licensed premises).

[13] It was clear to all and sundry that the special circumstance relied upon by the respondent for the order of stay of proceedings was that the Malaysian courts were not the proper forum. We now reproduce the summons in chambers in relation to the grounds:

> ... that the plaintiff's action against the defendant in this suit and all proceedings relating to it be stayed on the ground that Malaysian courts are not the proper forum for the prosecution of the plaintiff's claim on the principle of forum non conveniens.

[14] Despite such conspicuous clarity regretfully the learned judge had failed to touch on this supplied special circumstance. As we said above even the respondent had conceded that this issue of forum non conveniens was not considered by the learned judge. This doctrine of forum non conveniens in a gist refers to the discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried elsewhere. The phrase does not mean that the court before which the issue is being canvassed is not convenient but that some other court is more suitable (*Black's Law Dictionary*). *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 had accepted this doctrine which originated from Scotland when Lord Goff said:

> … there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

[15] Regretfully this special ground of forum non conveniens supplied by the respondent was not considered by the judge. By that failure he had failed to consider factors in the like of relative ease of access to sources of proof, availability of processes to ensure attendance of witnesses willing or unwilling, costs involved in that exercise, and all practical problems that could make a trial easy, expeditious and inexpensive in Nevada. With this error it cannot be said that the respondent had satisfied the court that some other forum was more suitable or appropriate.

[16] In fact, a further perusal of the judgment also showed that the judge had failed to consider whether the respondent was amenable to Nevada's jurisdiction, apart from not impressing him that some other forum was appropriate (*MacShannon v Rockware Glass Ltd* [1978] AC 795 (HL)). Here the learned judge had instead erroneously targeted the pros and cons of gambling as his main ground of allowing the application of stay.

[17] In the course of the appeal the respondent had submitted, in a gist, that parties had agreed at arms length the expectations of parties that only Nevada has the jurisdiction to resolve the matter. In support of its stance, the respondent had referred to the American case of *Zapata Off-Shore Co v The Bremen and Unterweser Reederei GMBH (The Chaparral)* [1972] US CT 315. The court, inter alia, had opined:

> The correct approach was to enforce the clause unless the plaintiffs would clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid, eg by reason of fraud. The threshold question is whether the court should have exercised its jurisdiction to do more that give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.
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> … Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do, was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain.

[18] With every respect to the above view, a perusal of the documents alluded to merely showed printed words which were hazy in contents, let alone yet to be established as admissible in law. How could such receipts, at best stand in the way of the entrenched statutory rights of the defendant

promulgated under s 23(1) of the Courts of Judicature Act 1964, by virtue of him being a resident of Malaysia. It takes more than hazy markers, which formed part of a contract, to circumvent a statutory right emanating from the Federal Constitution to oust the Malaysian courts.

[19] On hindsight, if the respondent had strongly believed that the action of the appellant was an abuse of the process of the court because of the ouster clause in the markers, why go through the processes of a stay application, when a striking out action would have resolved the matter speedily. The relevant provision would be under O 18 r 19(1) of the Rules of the High Court 1980. He could have alleged that the appellant's action disclosed no reasonable action, scandalous, frivolous or vexatious, or an abuse of the process of the court. The fact that the respondent has not taken this route, or unreasonably demanded the case be heard at Nevada, jerks our suspicion that he was merely playing for time. He also had an ace in the Reciprocal of Enforcement of Judgments Act 1958 as the United States of America is not a signatory to it (see below).

[20] As the appellant was entitled legally to commence its action in Malaysia, apart from the respondent having failed to satisfy the court that some other forum was more suitable or appropriate, it would be quite unjust to confine the appellant to remedies elsewhere. The source of that remark is the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir* [1995] 1 MLJ 160, where after discussing the above case of *Spiliada Maritime Corp v Cansulax Ltd* Peh Swee Chin FCJ had added:

> that in all cases of either a defendant's application for stay of proceedings ... it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with forum non conveniens.

[21] It must be appreciated that the United States of America is not a signatory of the Reciprocal of Enforcement of Judgments Act 1958, and as such a successful judgment there may not be easily enforced in Malaysia. Imagine the monumental problems and sufferings that will befall the appellant if the matter were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment. Apart from being costly it would be plainly illogical and unjust.

A **[22]** It was based on all the above reasons that we allowed the appeal with costs.

Appeal allowed with costs.

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Reported by K Nesan

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